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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE KINSEL,

Petitioner,

v.

JACK WOLFE,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Hot Springs County, Wyoming And The Supreme Court, State Of Wyoming

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the mere allegation that a statement made by a Federal official in the course of his duties to a person outside the Government was slanderous deprive him of the absolute immunity of the doctrine of *Barr* v. *Matteo*, 360 U.S. 564 (1959)?

2. May a State Appellate Court refuse to review a denial of a claim of absolute immunity under Federal law from suit, on the ground that the Order effecting that denial is not "final"?

PARTIES TO THE PROCEEDINGS

1. Petitioner is George Kinsel. Mr. Kinsel was the Defendant in the District Court of Hot Springs County, Wyoming, and the Appellant in the Supreme Court of Wyoming.

2. Respondent Jack Wolfe was the Plaintiff in the District Court of Hot Springs County, Wyoming, and the Appellee in the Supreme Court of Wyoming.

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Petition For A Writ Of Certiorari To The District Court Of Hot Springs County, Wyoming And The Supreme Court, State Of Wyoming

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PETITION FOR A WRIT OF CERTIORARI

George Kinsel petitions for a writ of certiorari to the District Court of Hot Springs County, Wyoming and the Supreme Court, State of Wyoming.

OPINIONS AND JUDGMENTS BELOW

The letter opinion of the District Court of Hot Springs County, Wyoming, of August 19, 1981, and the Order dated October 2, 1981 and entered on the docket on October 5, 1981 thereupon; and the letter denial of reconsideration dated October 28, 1981, and the Order dated and entered on the docket on November 10, 1981 thereupon appear, respectively at pp. 1a, 3a, 5a, and 6a of the Appendix to the Petition. None is reported.

The Order Dismissing Appeal of December 30, 1981, by the Supreme Court, State of Wyoming, and its Order Denying Reinstatement of January 26, 1982, appear, respectively, at pp. 8a and 10a of the Appendix. Neither is reported.

JURISDICTION

The Order of the District Court of Hot Springs County, Wyoming, was entered on October 5, 1981; a Motion for Reconsideration was filed on October 7, 1981, and denied by Order entered November 10, 1981.

Notice of Appeal to the Supreme Court, State of Wyoming, was filed on November 10, 1981. The Appeal was dismissed by Order entered on December 30, 1981. A Petition for Reinstatement was filed on January 21, 1982, and denied by Order of January 26, 1982.

By Order of March 22, 1982, Justice White extended the time for filing a petition for a writ of certiorari to and including May 29, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). Inasmuch as the State Supreme Court has held that no right of appeal is available from a denial of a claimed absolute immunity from this suit under Federal law, Petitioner considers that the writ of certiorari is appropriately sought from the District Court, as "the highest court of a State in which a decision could be had," under 28 U.S.C. § 1257. Alternatively,[1] and in respect particularly to the second ques-

[1] This Court has on several occasions granted petitions for writs of certiorari directed in the alternative to a lower State Court and the State Supreme Court. *See, e.g., Local 24 of the International Brotherhood of Teamsters* v. *Oliver*, 356 U.S. 966 (1958), *opinion on the merits*, 358 U.S. 283 (1959); *Arnold* v. *Panhandle & Santa Fe Railway Co.*, 352 U.S. 820 (1956), *opinion on the merits*, 353 U.S. 360 (1957); *Chesapeake & Ohio Railway Co.* v. *Mihas*, 279 U.S. 827, *opinion on the merits*, 280 U.S. 102 (1929); *Minneapolis, St. Paul & Sault Ste. Marie Railway Co.* v. *Rock*, 278 U.S. 593

tion presented by this Petition, Petitioner seeks the writ from the Supreme Court, State of Wyoming.[2]

STATEMENT OF THE CASE

Petitioner George Kinsel at the times pertinent to this suit was a Supervisory Engineer in charge of the Themopolis, Wyoming, office of the United States Geological Survey, Department of the Interior. Respondent Jack Wolfe, a trucker of oil in the area, brought this slander action against Kinsel in the District Court of Hot Springs County, Wyoming, asserting that Kinsel had imputed to Wolfe the crime of "stealing oil."

Under Department of Interior regulations, rentals and royalties are payable to the United States Geological Survey on producing oil and gas leases on Federal land. *See* 43 C.F.R. § 3103.1-2. Royalties are payable "on the production removed or sold from leases," 43 C.F.R. § 3103.3-4. Petitioner Kinsel was responsible for supervising all oil and gas operational activities on Federal and Indian lands in his district, and for securing compliance with lease terms and applicable rules and regula-

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(1928), *opinion on the merits*, 279 U.S. 410 (1929). Although it is stated in R. Stern & E. Gressman, Supreme Court Practice (5th ed. 1978) ¶ 6.21 at 446, that this protective practice is not preferred, the cases cited do not appear to bear out that view. As here, there may sometimes be no satisfactory alternative, lest the substantial rights of the Petitioner be lost by counsel's understandable but faulty choice in an unclear situation.

[2] Under the Federal law applicable in this Court, a decision denying an absolute immunity is "final" for purposes of appealability, *e.g.*, *Helstoski* v. *Meanor*, 442 U.S. 500, 506-08 (1979), and cases cited in the text below at p. 9. Despite the fact that further State Court proceedings are contemplated by the Orders from which review is sought, they should therefore be deemed final for purposes of § 1257; "statutorily created finality requirements should, if possible be considered so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered . . . ." *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976).

tions (Curtis Declaration ¶ 3).[3] Part of Kinsel's job "was to be sure that the oil and gas produced from Federal leases is properly handled, properly accounted for and the Government receives its royalty" (Kinsel Dep. Tr. 27).

On March 27, 1980, Kinsel received a telephone call from a Geological Survey field technician under his supervision, concerning the removal of oil from a well leased by the Altus Exploration Company. The field technician reported that he had been at the well; that oil was being removed from the location; and that he could not be sure "which direction all these trucks were going from the location, if all the oil was being hauled where it was supposed to go" (Kinsel Dep. Tr. 14). The field technician further advised Kinsel that he had had a heated discussion with Respondent Wolfe, who had insisted that it was "none of the Government's business where the oil was going" (*id.* 19).

Upon receiving this information, Kinsel called the offices of Altus Exploration Company in Denver, and reached one Elmer Herbaly (*id.* 13). Kinsel advised Herbaly of the information received from the field technician, and stated that he was rescinding a limited oral approval he previously had given to haul oil off the lease to be stored and separated. He requested Herbaly to cause the well to be shut down (*id.* 19). Wolfe's Complaint is based on the assertion, denied by Kinsel (*id.* 17-18), that Kinsel in this conversation with Herbaly imputed the stealing of oil to Wolfe.

Kinsel moved to dismiss or for summary judgment on the ground that he was absolutely immune from a defamation suit based upon actions taken within the general

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[3] Charles Curtis, the Area Oil and Gas Supervisor, United States Geological Survey, in Casper, Wyoming, was Kinsel's immediate supervisor. His Declaration referred to in the text was filed in support of Kinsel's Motion to Dismiss or in the Alternative for Summary Judgment.

scope of his official duties, under the doctrine of *Barr* v. *Matteo*, 360 U.S. 564 (1959). In support of the motion he filed Declarations of himself and his immediate superior, and his official position description which states, *inter alia*:

> "Within a broad framework of policy and planning set forth by the Regional Oil and Gas Supervisor and his principal assistants, incumbent serves as technical and administrative head of an independent field office. Incumbent is responsible for planning, executing, and monitoring the progress of programs of this field office. Incumbent regularly renders decisions on problems for which there is no available precedent and guideline and is often called upon to apply studied, mature, scientific judgment in reaching conclusions on novel and unusual situations and/or problems. Many decisions made by incumbent are, of necessity, on-the-spot decisions that can only be reviewed by the Supervisor after-the-fact. Improper decisions can result in the loss of thousands of dollars of the Federal lease holder."

In opposition to the motion, Plaintiff filed a one-paragraph affidavit of Herbaly asserting that in the telephone conversation, Kinsel had said that the trucker was stealing oil, and Herbaly associated Wolfe as the sole managing executive of the trucking company. Plaintiff submitted no evidence to the effect that Kinsel's activities were outside the scope of his duties.

On August 19, 1981, the District Court issued a letter opinion (Pet. App. 1a), stating that Kinsel's motion would be denied. It reasoned as follows:

> "I have no problem with *Barr v. Matteo* and the holding that absolute immunity attaches but I feel that the principle would only apply in the case of a government employee (i.e. Kinsel in the instant case) when such employee was making a report to a superior or to another employee. Granted, the purpose of the phone call by Kinsel to Herbaly concerned

> an oil problem which fell within the scope of Defendant's employment, but the alleged slanderous statement concerning the Plaintiff made to Herbaly falls in my opinion beyond the ambit of his employment. The statement to Herbaly transcends not only the outer perimeter of Kinsel's duties but I fail to see that such a remark to a third person can be considered an appropriate exercise of discretion with full immunity afforded Kinsel."

An Order denying the motion was entered on October 5, 1981. This Order states "that no absolute privilege should be afforded Defendant, but only a qualified privilege as indicated in the dissenting opinion in Barr -vs- Mateo [sic] by Mr. Justice Brennan . . ." (Pet. App. 3a). After a motion for reconsideration was denied on November 10, 1981 (Pet. App. 6a), Kinsel noted an appeal to the Supreme Court of the State of Wyoming. That Court, *sua sponte*, on December 30, 1981, entered an Order Dismissing Appeal on the ground that the Order appealed from was not a final Order (Pet. App. 8a). Kinsel filed a Petition for Reinstatement, based on the ground that where an absolute immunity from suit is asserted and denied, the Order is indeed final. Reinstatement was denied in an Order of January 26, 1982 (Pet. App. 10a), stating:

> "The Court, having carefully considered the matter, concludes that it is not subject to any prevailing federal rule for interlocutory appeal asserted."

REASONS FOR GRANTING THE WRIT

In two separate respects, the State Courts of Wyoming have failed to recognize the rights of a Federal employee under well-settled Federal law. First, the refusal to dismiss this suit was flatly irreconcilable with the decision in *Barr* v. *Matteo*, 360 U.S. 564 (1959). The reasoning that a communication otherwise within the outer perimeter of a Federal employee's duties loses that character merely because it is made to someone outside

the Government or merely because it is alleged to be tortious, is refuted by *Barr* itself, and by the companion case of *Howard* v. *Lyons*, 360 U.S. 593 (1959), both themselves defamation suits. Second, the refusal of the Wyoming Supreme Court, on the ground of non-finality, to entertain an appeal from an Order effectively negating a claim of absolute privilege of a Federal employee is an invalid refusal to recognize Federal law. In this respect, too, the rulings below do not conform to the leading decisions of this Court, which require that a State Court provide a procedural means for the protection of rights under Federal law. *E.g.*, *Dice* v. *Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952).

In each respect, the rulings below present important questions of Federal law of a kind reviewed regularly by this Court.

I. THE COURTS BELOW FAILED TO FOLLOW CONTROLLING DECISIONS OF THIS COURT.

Barr v. *Matteo* and *Howard* v. *Lyons* leave no room for doubt that Petitioner Kinsel is absolutely immune from this slander action.[4] Unquestionably his calling a lessee concerning the movement from Federal lands of oil, on which royalties were payable to the United States, was well "within the outer perimeter of Petitioner's line of duty" as a United States Geological Survey supervisory engineer. *Barr*, 360 U.S. at 575. The ruling of the lower Court that those leading decisions establish absolute immunity only for communications within the Government is directly contrary to their holdings. *Barr* and *Howard* were themselves defamation actions based upon communications by Federal officials with persons

[4] As this suit is not based on any alleged Constitutional violation, the immunity plainly is an absolute, not merely qualified, one. *Butz* v. *Economou*, 438 U.S. 478, 494-95 (1978); *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution*, 566 F.2d 289 (D.C. Cir. 1977) (*en banc*), *cert. denied*, 438 U.S. 915 (1978); *Evans* v. *Wright*, 582 F.2d 20 (5th Cir. 1978).

outside the Government. The lower Court apparently recognized that it was disregarding this clear authority of this Court, for it relied on the dissenting opinion in *Barr*, rather than the opinion of this Court. Manifestly, there is a clear-cut failure to follow the rulings of this Court on a matter of Federal law.[5]

Likewise, the theme of the ruling denying immunity here, that the communication was not privileged if it was wrongful, was specifically rejected in *Barr*, 360 U.S. at 572. This Court quoted with approval from *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950), on this very point:

> ". . . it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine."

The problem of damage suits against Federal officials is a continuing and important one. The Assistant Attorney General for the Civil Division, Department of Justice, has estimated that approximately 7,500 to 10,000 such suits have been filed in the past 11 years.[6] Whether or not such suits are dismissable without trial when

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[5] The present case indeed is a far clearer one for absolute immunity than *Barr* and *Howard*. The communication here was to a single recipient; in *Barr* it took the form of a press release, and in *Howard* a communication with the media. Moreover, there was no suggestion that the defendants in those cases were required to make the communication; Kinsel might well have been deemed derelict in his duties had he failed to communicate with the oil lessee in the face of the information he received. Accordingly, his action was not only within the "outer perimeter" of his duties, but at their core.

[6] Press Release of J. Paul McGrath, Department of Justice, March 31, 1982, to be published in *Proposed Amendments to the Federal Tort Claims Act: Hearings on S. 1775 Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982).

based on alleged common law torts is a matter of great significance in judicial administration as well as in the conduct of Government activities.

II. THE STATE COURTS MUST GIVE EFFECT TO FEDERAL LAW; AND CANNOT DEFEAT AN ABSOLUTE IMMUNITY UNDER THAT LAW BY CHARACTERIZING ITS DEFEASANCE AS NON-FINAL.

The *Barr* doctrine is one of "peculiarly federal concern, and it would deny the very considerations which give the rule of privilege its being to leave determination of its extent to the vagaries of the laws of the several States." *Howard* v. *Lyons*, 360 U.S. at 597. It is equally clear that one facet of this Federal law is that the protection is one against "*suits* which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Barr*, 360 U.S. at 571 (emphasis added). Absolute immunity protects defendants " 'not only from the consequences of litigation's results but also from the burden of defending themselves.' " *Supreme Court of Virginia* v. *Consumers Union of the United States*, 446 U.S. 719, 732 (1980) (quoting *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967)).

For this reason, it has been uniformly recognized that an order denying a Federal absolute immunity defense is "final" and appealable immediately. *Helstoski* v. *Meanor*, 442 U.S. 500, 506-08 (1979) (Speech or Debate Clause); *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1207-09 (3d Cir. 1979), *cert. denied sub nom. Mitchell* v. *Forsyth*, 453 U.S. 913 (1981) (*Barr* immunity); *Dellums* v. *Powell*, 660 F.2d 802, 804 (D.C. Cir. 1981) (*Barr* immunity).[7]

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[7] A similar issue concerning a suit brought in federal district court has been raised in *Nixon* v. *Fitzgerald* and *Harlow* v. *Fitzgerald, cert. granted*, 452 U.S. 959 (1981) (Nos. 79-1738, 80-945).

Petitioner submits that the State Courts cannot fail to apply such a Federal privilege by labelling defeasance of the Federal protection against suit "non-final"—which it would not be under the standards of Federal law described above. This Court has consistently refused to be bound by state procedural rules when their application would frustrate Federal rights and privileges. *E.g.*, *Brown* v. *Western Railway of Alabama*, 338 U.S. 294 (1949) (rule construing pleadings against the pleader); *Dice* v. *Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952) (right to jury trial); *Wright* v. *Georgia*, 373 U.S. 284 (1963) (rule requiring explicit identification of arguments in appellate briefs); *Chapman* v. *California*, 386 U.S. 18 (1967) (harmless error rule). Of course, "when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless . . . the state rule is in conflict with federal law." *Ferri* v. *Ackerman*, 444 U.S. 193, 198 (1979). But "considerations of state law may be displaced where their application would be inconsistent with . . . federal policy . . . ." *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 465 (1975). Indeed, "federal courts must be ever vigilant to insure that application of state law poses 'no significant threat to any identifiable federal policy or interest . . . .'" *Burks* v. *Lasker*, 441 U.S. 471, 479 (1979) (quoting *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63 (1966)).

In the present case, the Wyoming rule treating the denial of Petitioner Kinsel's immunity claim as non-final[8] undercuts the fundamental purpose of the im-

[8] Under other circumstances, such as the granting by the state district court of a temporary injunction, the Wyoming Supreme Court has treated an interlocutory order as "final" for purposes of immediate appeal. *See* Note, *The Right to Appeal in Wyoming*, 18 Wyo. L.J. 61, 62-63 (1963). Wyoming Rule of Appellate Procedure 1.05 defines a final order, *inter alia*, to include "an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action, after judgment." Even if this

munity privilege: "that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits . . . ." *Barr*, 360 U.S. at 571. Even if Kinsel were to prevail on the merits of his defense, the Wyoming Supreme Court's decision would have forced him to endure the burden and expense of a needless trial. The Petitioner's rights "are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it . . . ." *Lawrence* v. *State Tax Commissioner of Mississippi*, 286 U.S. 276, 282 (1932).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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definition did not on its face require a holding that the Order at issue here was final, it left ample room to respect the Federal right asserted by considering an immediate appeal. Thus, if a motion for temporary injunctive relief is considered a "special proceeding" for appeal purposes in Wyoming practice, as it is, there was no apparent reason why one raising a claim of absolute privilege from trial could not equally have been so considered.